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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 498

3145# 44
POL-REI

GEORGE POLAKOFF AND WILLIAM ALBERT,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

IRVING SPIELER,
Counsel for George Polakoff;
LOUIS HALLE,
Counsel for William Albert.



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THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, George Polakoff and William Albert, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on July 14, 1941, affirming the convictions of your petitioners in the United States District Court for the Southern District of New York.

Opinion Below.

The opinion of the court below (R. 175-179) has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 14, 1941 (R. 179). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

Questions Presented.

1. Whether the attempted persuasion of an Assistant United States Attorney, constitutes a corrupt endeavor to influence an officer of a court of the United States within the meaning of Section 135 of the United States Criminal Code.

2. Whether a conspiracy to commit a substantive offense (Title 18, U. S. C. Section 241) which is in its very nature "an attempt", constitutes an indictable offense.

Statutes Involved.

The statutes involved, Title 18, U. S. Code, Sections 88 and 241, are as follows:

Title 18, Section 88, United States Code:

(Criminal Code, Section 37.) Conspiring to commit offense against United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Section 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Section 37, 35 Stat. 1096.)

Title 18, Section 241, United States Code:

(Criminal Code, Section 135.) Attempting to influence witness, juror, or officer.—Whoever corruptly,

or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any Court of the United States or before any United States Commissioner or officer acting as such Commissioner, or any grand or petit juror, or officer in or of any Court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both. (R. S. Secs. 5399, 5404; Mar. 4, 1909, c. 321, Sec. 135, 35 Stat. 1113.)

Statement.

The petitioners were indicted for conspiracy to obstruct justice by attempting to influence an Assistant United States Attorney in his recommendation of a sentence to the district judge in the case of one Sidney Kafton (R. 9-12). Petitioners were found guilty by the jury (R. 147) and each was sentenced to two years' imprisonment (R. 13-16). The petitioners were tried upon the same charge on two previous occasions. The first trial resulted in a disagreement (R. 4). After a second trial the petitioners were convicted, but, upon appeal, a new trial was ordered because evidence improperly secured had been admitted. (112 F. (2d) 888, certiorari denied 61 S. Ct. 41.)

Kafton and his brother-in-law, Harry Goldfarb, had been indicted for narcotic offenses (R. 20). Both of these men were confirmed criminals and had criminal records. Kafton, while serving in the United States Navy, had been courtmartialed and sentenced to imprisonment for a term of five years (R. 48). In 1920, he had pleaded guilty to the

crime of attempted grand larceny (R. 48). He sold narcotics for a year and a half (R. 50) which led to his arrest and indictment. Kafton was also convicted in Putnam County, New York, for the crime of malicious mischief based upon a charge of "rifling of telephone boxes" (R. 52). Goldfarb's criminal record included, besides his indictment with Kafton on the narcotic charge, a plea of guilty to an indictment for forgery (R. 77).

After Kafton's release on bail on the narcotic charge in the federal court, he surrendered to the Putnam County authorities and began serving his sentence for malicious mischief and disorderly conduct (R. 25). While in Putnam County jail he was visited by a United States Government agent (R. 52), and agreed to become an informer for the Government at the end of his sentence on the malicious mischief charge (R. 56). He was released from the Putnam County jail on September 22, 1939 (R. 52).

Actually, therefore, and prior to the inception of this case, Kafton was hired as an informer for the Government and had already been promised consideration for his services to the Government (R. 53). Kafton understood by the promises he received from the Government that sentence upon the narcotic charges would be suspended (R. 53, 67, 69). He, of course, knew that the petitioners could be of no help to him.

The petitioners were engaged in the bonding business (R. 126; Ex. 1, R. 150) and have never been convicted of any crimes. According to the testimony of Kafton, the petitioner, Albert, suggested to Kafton that for a sum of money he could secure a low sentence for him (R. 29). Kafton, instead of disregarding this idle boast, reported the incident to the Narcotics Bureau (R. 30). Kafton was told to "go ahead" (R. 64) and events following were the result of a plan by Kafton and Government officials to incriminate the petitioners.

Kafton allegedly continued these negotiations with Albert, finally stating to the petitioner, Albert, that he could not raise $750, the sum requested by Albert, but that he might possibly obtain $500 (R. 33).

These transactions between Kafton and the petitioner, Albert, of course did not, by themselves, constitute the alleged ultimate criminal acts. This is admitted by the Circuit Court of Appeals in its opinion (Opinion, R. 179).

However, it was the theory of the prosecution that the petitioner, Polakoff, in the meantime was attempting to influence the Assistant United States Attorney in charge of the Kafton case to recommend a reduced sentence and to bring it before a certain Judge who would probably reduce it still more, following his custom with respect to the prosecutor's recommendations. Under the decision of the Circuit Court of Appeals, the Court below held that the conduct of the petitioners, Albert and Polakoff, came within the condemnation of Section 135 of the United States Criminal Code when the petitioner, Polakoff, attempted "false persuasion" (Opinion, R. 179).

In view of the significance of the discussions between the Assistant United States Attorney and the petitioner, Polakoff, the evidence in connection therewith shall be stated in greater detail.

The Assistant United States Attorney in charge of the Kafton case was one Edward J. Behrens (R. 85). The petitioner, Polakoff, had known the Assistant United States Attorney socially, and the latter and his wife had been entertained by the petitioner, Polakoff, and his wife before any matters connected with this case arose (R. 87-88).

Mr. Behrens testified that it was not unusual for lawyers to talk to him about what his recommendations would be in cases of a plea of guilty (R. 100). He admitted that many people customarily came into his office on various occasions about various cases and asked him what his

recommendation would be in criminal cases handled by him (R. 100).

Mr. Behrens knew that Kafton was working as an informer for the Government (R. 99).

The petitioner, Polakoff, first approached Mr. Behrens during the week of October 9th, and simply inquired whether Kafton would receive consideration if he pleaded guilty (R. 89). According to Mr. Behrens, petitioner, Polakoff, gave as an excuse for making this inquiry the fact that he wanted to clean up all the cases where he had written bail for defendants (R. 89). Behrens, answering the inquiry of Polakoff, pretended that he was not interested in whether Kafton stood trial or pleaded guilty and stated that he would look through the files of the Kafton case (R. 89).

On two or three subsequent occasions, upon inquiries made by the petitioner, Polakoff, Mr. Behrens stated to him that he had not yet looked at his files (R. 90).

The petitioner, Polakoff, came to Mr. Behren's office again on either the 18th or 19th day of October, 1939, and asked Mr. Behrens whether he had had an occasion to look through the files of the Kafton case (R. 90). Mr. Behrens answered that he had, and said that he had spoken to the Narcotics Bureau and that they wanted a five-year sentence for Kafton (R. 90). Of course, Mr. Behrens knew that Kafton was an informer and apparently deliberately exaggerated the extent of the sentence which he stated the Narcotics Bureau desired in order to encourage Polakoff to incriminate himself, for by that time he had been fully apprised by Kafton and the Government officials of the statements made by the petitioner, Albert. Polakoff only remonstrated that such a recommendation was severe for a first offender and then declared that he was not interested in what the recommendation of Mr. Behrens would be, and requested that the case be placed upon the calendar for pleading before Judge Bondy (R. 90). A Clerk of the Court testified that there

was nothing unusual about advancing a case for pleading (R. 106).

Although Mr. Behrens told petitioner, Polakoff, that he would adjourn the case from the 20th to the 25th day of October, 1939, he deliberately gave instructions to have the case adjourned to November 3, 1939, beyond the period when Judge Bondy was assigned to sit (R. 91). This change in the date was called to Mr. Behren's attention by Polakoff and Mr. Behrens stated that if Kafton desired to plead guilty, the case could be added to the calendar of a prior date (R. 91).

According to the testimony of Mr. Behrens, the petitioner, Polakoff, again came to see him on October 21st, 1939. At that time, according to Mr. Behrens, Polakoff stated that a politician was interested in Kafton and wanted to get a two-year recommendation for him (R. 92). Behrens merely answered that he was sorry but that the Narcotics Bureau wanted five years "and five years it was" (R. 92). Mr. Behrens testified that he saw the petitioner, Polakoff, again on October 24th, 1939. Polakoff, Mr. Behrens testified, merely inquired whether he had thought the Kafton case over during the week-end. Mr. Behrens answered that he had and that "the Bureau wanted five years and that was the end of it" (R. 93).

The petitioner, Polakoff, made no attempt to influence Mr. Behrens and presented legitimate arguments why he believed the recommendation to be severe (R. 93). Polakoff remarked that it was puzzling to him for the Narcotics Bureau to make such a recommendation for a man charged with his first offense in violating the Narcotics laws (R. 93). He pointed to the fact that in a much more serious case the District Attorney had recommended a sentence of two years (R. 94).

Finally, on that same afternoon, Mr. Behrens, pretending that he talked to the Narcotics Bureau again, told Polakoff that they stated that any recommendation made by him would be satisfactory to the Narcotics Bureau. Mr. Behrens again pretending that he had been persuaded and apparently in accordance with the preconceived plan of the Government officials, said that he would make a recommendation for a sentence of two years (R. 95).

Kafton's case was put on the calendar for the 26th day of October, 1939 (R. 96).

Before the case was called, the petitioners were arrested and taken into custoday on the same day. No money had been paid by Kafton to the petitioners. There is no charge in this case that any Government official was bribed or that there was an attempt to bribe any Government official. The entire theory of the Government was that Polakoff, by his "discussions" with Mr. Behrens, had furnished the requisite proof that the petitioners were parties to a conspiracy to corruptly influence an Assistant United States Attorney in the performance of his duty.*

Specification of Errors to be Urged.

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that attempted persuasion by arguments was an endeavor to corruptly influence the officer of a Court of the United States or to corruptly influence or obstruct the due administration of justice within the meaning of Section 135 of the United States Criminal Code.

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* When the indictment involving Kafton and Goldfarb came up for disposition in February, 1940, apparently, in accordance with the earlier agreement made with these two self-confessed dope-peddlers and convicts, they each received suspended sentences (R. 53, 79).

2. In holding that a conspiracy to endeavor to corruptly influence an officer of a Court of the United States is an indictable offense within the terms of Section 37 of the United States Criminal Code.

3. In affirming the judgments of conviction.

Reasons for Granting the Writ.

The Circuit Court of Appeals in its opinion admits that "exact precedents appear to be lacking" and therefore, questions decided by the court below are of first impression in the Circuit Court of Appeals (Opinion, R. 177). Although there is, therefore, no conflict of the decisions, the issues are of obvious importance, as the court below also admitted in its opinion (Opinion, R. 175). The questions of federal law raised by this case have not been, and should therefore be, settled by this Court.

In our view, the decision below in the present case constitutes an unwarranted and unreasonable extension of the principles of the cases decided under Section 135 of the Criminal Code. The decision reached by the court below is so sweeping in its implications that there should be a review and determination by this Court.

Petitioners contend that the crimes charged were not proven. The petitioner Albert's alleged request for a sum of money upon a promise to obtain a low sentence for Kafton, or Kafton's promise to pay for the effort, were not the ultimate criminal acts. The petitioners were not charged with attempting to obtain money under false pretenses and the testimony of Kafton and the other witnesses, if believed, will only tend to sustain such a charge, but that is not the offense with which these petitioners have been charged. *Rosner* v. *United States*, 10 F. (2d) 675, 676. The guilt or innocence of the petitioners must necessarily depend upon the effect of the conduct of Polakoff in his

discussions with the Assistant United States Attorney, Mr. Behrens. It is our respectful submission that this conduct did not establish a conspiracy to corruptly influence an officer of a Court of the United States.

The court below, at the conclusion of its opinion (Opinion, R. 178) summarizes the scope of Polakoff's activities as follows:

> "Here Polakoff was endeavoring to persuade the Assistant District Attorney to be lenient with Kafton, for reasons falsely assigned."

The court below held that the ultimate criminal act was committed when Polakoff attempted "false persuasion" (Opinion, R. 179). It is the contention of the petitioners that the arguments of the petitioner, Polakoff, for that is all that his conduct amounted to, never reached the point of "attempted persuasion". Indeed, Mr. Behrens, the Assistant United States Attorney, testified that Polakoff finally disclaimed any intention to "persuade Mr. Behrens" to recommend a two year sentence for Kafton, for the petitioner, Polakoff, said, according to Mr. Behrens, "I don't care what you recommend; whether you recommend two years or five years, will you have it so that the hearing can be had before Judge Bondy?" (R. 102, 90). However, it is significant that the conclusion most favorable to the Government which the court below could draw from all of the evidence, was that Polakoff attempted "false persuasion".

It is the respectful submission of the petitioners that the conduct of the petitioner, Polakoff, did not reach the degree of criminality aimed at under Section 135 of the United States Criminal Code. There was concededly no attempt by petitioner, Polakoff, to bribe Mr. Behrens or to corruptly influence him. Indeed, the alleged conspiracy, as set forth in the indictment, negatives any such theory. Nothing that

petitioner, Polakoff, actually said had the tendency to corruptly influence the Assistant United States Attorney or to obstruct or impede the due administration of justice.

The following portion of the dissenting opinion of Mr. Justice Holmes in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 424, is particularly applicable to the effect of the conduct of the petitioner, Polakoff, in this case:

> "But a Judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a Judge could have found in any line that was printed even a tendency to prevent his performing his sworn duty."

The *Toledo* case was overruled by this Court in *Nye* v. *United States,* 61 S. Ct. 810, and the views of the dissenting justices were adopted.

What Justice Holmes wrote might be said with equal force about an Assistant United States Attorney. Paraphrasing the above quotation and applying it to the facts in the case at bar, it might also be said that it is impossible to believe that the Assistant United States Attorney could have found in anything said or done by the petitioner, Polakoff, even a tendency to prevent Mr. Behrens from performing his sworn duty.

"Attempted persuasion" is not made criminal under Section 135 of the United States Criminal Code. "Corruptly influence" as used under Section 135 of the Criminal Code, does not include or cover persuasion by argument. *City of Tecumseh* v. *City of Shawnee,* 148 Oklahoma 128, 137. Nor is alleged "false persuasion" a substantial substitute for influencing by "threats or force." *Daniels* v. *Lowery,* 92 Ala. 519, 522. And while it is true that Section 135 of the Criminal Code embraces a broad category of offenses, the conduct of the petitioners in this case does not come within the family of offenses described in that Section.

The decision of the court below introduces a new and exceedingly broad standard of guilt. The determination of the guilt or innocence of the accused resolves itself into an inquiry into the motives of the accused and the truth or falsity of the arguments or reasons assigned. If the reasoning of the court below is carried to its logical conclusion, a most extraordinary situation is reached. The Court below held that it is as "corrupt" to persuade a public officer by lies as by bribes (Opinion, R. 179). If the alleged reasons assigned by Polakoff were true and if it were a fact that Kafton's bond was written by Polakoff's company and he was trying to dispose of the case or that he (Polakoff) was indebted to a politician, then under the theory of the opinion of the Court below the "persuasion" would not amount to "corrupt influence". Under that theory, persuasion would become "corrupt influence", depending upon the state of mind of the accused. Indeed, the court below held that any misrepresentations of one's motives would be a fraud and a violation of Section 135 of the Criminal Code. Such an interpretation carries us far afield from the strict requirements of a criminal statute. Indeed, the case cited by the court below, *Marshall* v. *The Baltimore Ohio Railroad Co.*, 16 How. 314, 57 U. S. 314, which involved a civil action to recover for services rendered, demonstrates this.

Under the theory of the decision of the Court below, criminal liability would be predicated upon proof of motive regardless of the effect or tendency of the conduct of the accused. Every false argument made to an officer of a court of the United States, whether significant or insignificant, material or immaterial, could be made the basis of an indictment under Section 135 of the Criminal Code. It is indeed no compliment to officers of courts of the United States to say that they can be "corruptly influenced" by arguments. Certainly, the alleged representations made by the petitioner Polakoff were neither significant or material.

The wording of Section 135 of the Criminal Code and the cases decided under it demonstrate, we believe, that a sterner test must be applied. The conduct of the accused must actually amount to an endeavor to influence the actions of an officer of a court of the United States. Arguments, whether false or true, do not amount to corrupt influence. If the broad standard of the court below is adopted, then, the prosecutions under this Section would be without limit. Every lawyer or advocate presenting an alleged false argument or who acted in his own interest would be subjected to the penalties of this statute. The decision of the court below extending without limit the category of offenses falling under the statute calls, we believe, for review by this Court.

Another phase of this case illustrates the injustice of the verdict of guilty and affirmance of the judgment of conviction by the court below. The petitioners were indicted under the conspiracy statute (Criminal Code, Section 37; 18 U. S. C. A. 88). The sentence imposed upon the petitioners, a term of two years, is the maximum penalty under the conspiracy statute. The maximum sentence which could have been imposed for violation of Section 135 of the Criminal Code is imprisonment of not more than one year. Under the Government's theory, the substantive offense had been committed and the Government attempted to prove the alleged conspiracy by establishing elements of the substantive offense. Under the circumstances of this case, we believe that no clearer case of abuse of indictment for conspiracy has ever been presented. *Heike* v. *United States*, 227 U. S. 131, 144.

Of equal importance is the question whether a conspiracy to endeavor to commit a crime is an indictable offense. It should be noted that the substantive offense with which the petitioners were charged with conspiring to commit,

is in its very nature "an attempt." The statute is described by the reporter of the United States Code Annotated as "attempting to influence witness, juror, or officer."

It is submitted that the petitioners could not have been charged with attempting to commit the substantive offense which is itself an attempt.

"One cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt. *People* v. *Thomas,* 63 Cal. 482; 3 Am. & Eng., p. 251, note 5." *State* v. *Hewett,* 158 N. C. 627, 629.

If there can be no such crime as attempt to endeavor to commit a crime, then obviously, a conspiracy to endeavor to commit a crime is not an indictable offense, for the same reason.

Conspiracy is analogous to attempt. Wharton's Criminal Law (12th Ed.) Sec. 1607. It is a species of attempt. Bishop, Criminal Law, Sec. 191. It follows the same rules, and is subject to the same limitations, *id.*, secs. 169, 191. Conspiracy is an attempt by two persons to commit a crime. Just as in the rules applicable to the law of attempted crime, so in a conspiracy, there must be proof not only of the unlawful intent, but the commission of an act to effect the object of the conspiracy.

If there were such a crime as conspiracy to endeavor to commit a crime, the overt act would necessarily be any act tending to effectuate an endeavor which in turn would be any effort towards the commission of the crime. The overt act, then, would be remotely removed by many degrees from the actual crime.

The indictment of the petitioners under the conspiracy statute in connection with a substantive offense which is itself "an attempt" or "an endeavor," was inequitable, unjust and prejudicial to the rights of the petitioners.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE POLAKOFF and
WILLIAM ALBERT,
Petitioners.

By IRVING SPIELER,
Attorney for Petitioner,
George Polakoff.
LOUIS HALLE,
Attorney for Petitioner,
William Albert.

Dated, New York, August, 1941.

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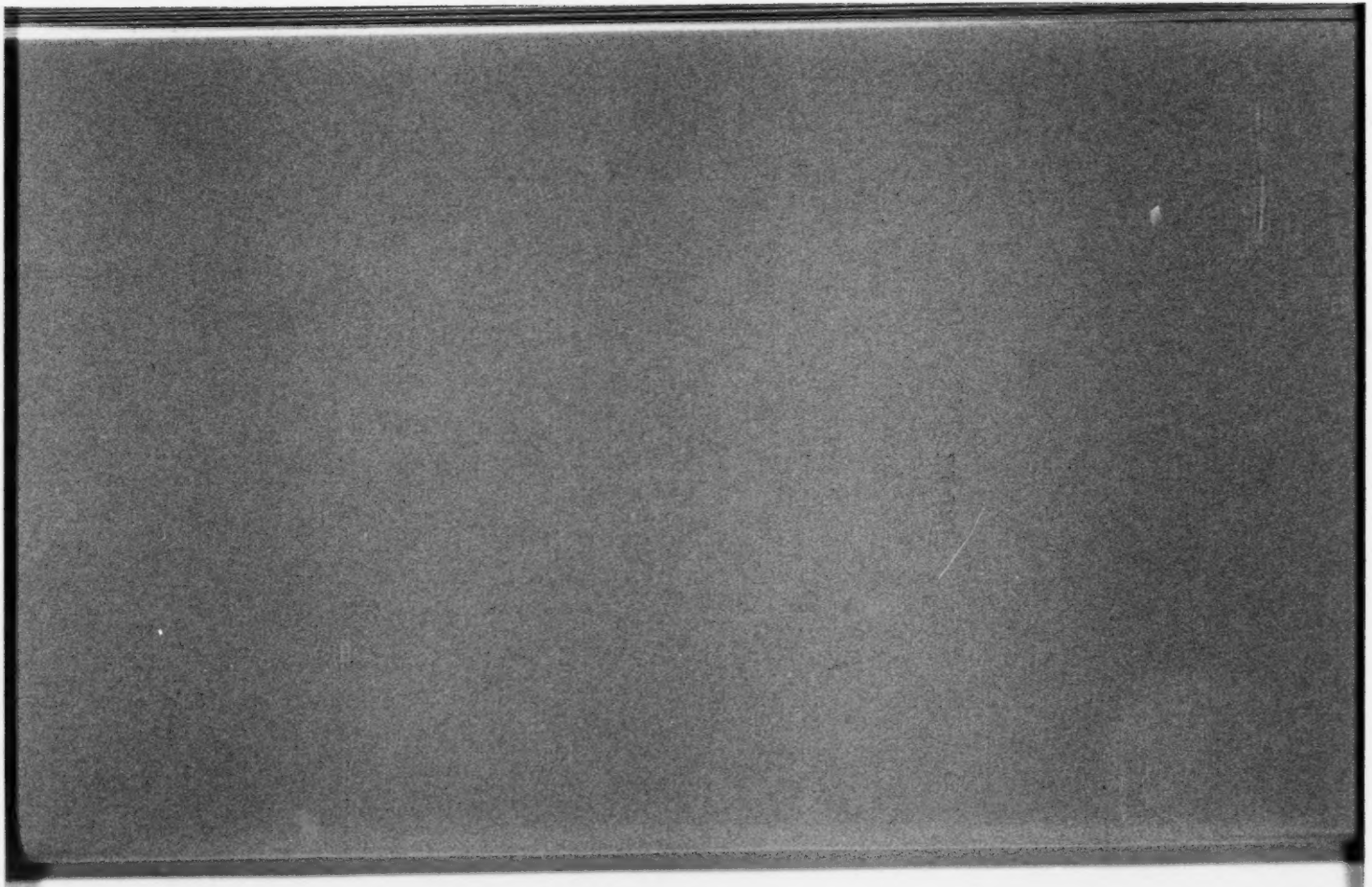
THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF.

IRVING SPIEGEL,
Counsel for Petitioner,
George Polakoff.

LOUIS HALLE,
Counsel for Petitioner,
William Albert.



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